KHOO TAU GUAN

v.

WENG LAI PING & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[CIVIL CASE NO: S-22-101-2002]
3 OCTOBER 2003

CIVIL PROCEDURE: *Amendment - Statement of claim - Whether plaintiff bound to confine himself to reliefs sought initially - Whether application bona fide - Whether character of the suit changed - Whether justiciable to allow amendments - Rules of the High Court 1980, O. 28 r. 8(1), (4) - Companies Act 1965, s. 162(1), (2)*

This was an appeal by the plaintiff against the decision of the learned deputy registrar dismissing the plaintiff's application by way of summons in chambers to amend his statement of claim, in particular, the deletion of prayer 1(a) to (g) thereof. The plaintiff had initially and principally applied, *via* originating summons ('OS'), for reliefs pursuant to s. 162 of the Companies Act 1965 ('the Act') consisting of rectification of the register of the 3rd defendant in relation to the plaintiff's application for reinstatement as a shareholder and director thereof. At the hearing of the OS, Ian Chin J rightly converted the OS to a writ action pursuant to O. 28 r. 4(2) of the Rules of the High Court 1980 ('RHC'). In consequence of the order, the plaintiff served on the defendants a writ together with a statement of claim seeking alternative reliefs in the form of orders for the payment of money from the 1st and 2nd defendants to the plaintiff and for the retention and deduction by the plaintiff of money due to the defendants. The defendants argued that: (i) the plaintiff should not be allowed to totally abandon the reliefs sought in the OS; (ii) the plaintiff's application was not made *bona fide* as he had failed to produce or identify documents that would render the amendment necessary; (iii) the plaintiff had changed the character of the suit by departing from the original reliefs for rectification. The plaintiff, however, averred that the OS and writ were two separate and distinct processes and the defendant could not, therefore, confine the plaintiff to matters stated in the OS.

Held:

[1] The only sensible consequence of O. 28 r. 8(1) and (4) of the RHC and Ian Chin J's order was that the plaintiff was not bound to confine himself to matters set out in the OS. It would be naïve to expect, and wrong to insist, that the plaintiff ignore what had transpired after the genesis of this case. There was, therefore, nothing sinister in the plaintiff's decision to abandon the reliefs sought in the OS and opt for a monetary claim instead after becoming aware that the 3rd defendant had meanwhile become insolvent. (p 253 f)

[2] From the tenor of s. 162(1) and (2) of the Act and the grammatical context of the word "and" between the words "register" and "payment" in s. 162(1) of the Act, it is obvious that "rectification of the register" and "payment by the company of any damages" are not conjoined but disjunctive. That being the case, the plaintiff's monetary claim was within the ambit of s. 162 of the Act. It was not alleged that the failure of the plaintiff to introduce or identify the document said to necessitate the application for amendment had prejudiced the defendants, and the plaintiff's omission in that regard did not constitute any lack of *bona fide* on the part of the plaintiff. (p 254 d-e)

[3] The defendants' contention that the character of the suit had been changed was an exercise in futility as the monetary claim of the plaintiff was already clearly set out in the alternative prayer in the statement of claim and, irrespective of the outcome of this application, remained an integral part of the statement of claim. (p 255 c-d)

[4] At the end of the day, the application for amendment, if allowed, must not cause injustice to the defendants. On the other side of the coin, justice dictated that litigants like the plaintiff must be given the choice to seek whatever form of redress open to the litigant within the relevant provisions of the law and rules of court, and to amend it if there was a need to do so, unshackled by what the litigant had originally contemplated when the action was first commenced. For the reasons stated above, there would be no injustice to the defendants if the amendment was to be allowed. (p 255 f-h)

[Appeal allowed.]

Case(s) referred to:

Bacom Enterprise Sdn Bhd v. Jong Chuk [1998] 2 CLJ 11 HC ***(refd)***

Syarikat Ting Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeal [1999] 4 CLJ 651 HC ***(foll)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 162(1), (2)

Rules of the High Court 1980, O. 28 rr. 4(2), 8(1), (4)

For the plaintiff - Roland Cheng; M/s Roland Cheng & Co

For the defendants - Colin Lau; M/s Colin Lau & Co

Reported by Suresh Nathan

JUDGMENT

Linton Albert JC:

At the conclusion of the hearing on 27 October 2003 and after considering both the written and oral submissions relating to the appeal I allowed the appeal with costs. I now give the reasons.

This is an appeal by the appellant (the plaintiff) against the decision of the learned deputy registrar given on 23 May 2003. The plaintiff had by a summons in chambers (the SIC) dated 7 March 2003 applied to amend the statement of claim dated 12 September 2002. The plaintiff had sought to amend paras 10 and 12 of the statement of claim and delete prayer 1(a) to (g) thereof. The amendment to paras. 10 and 12 were allowed because the respondents (the defendants) had no objection. The learned deputy registrar, in the face of strenuous resistance from the defendants to that part of the application seeking to delete the whole of prayer 1(a) to (g) of the statement of claim relating to reliefs prayed had agreed with learned counsel for the defendants, Mr. Colin Lau and dismissed the plaintiff's application in respect of prayer 1(a) to (g) with costs.

In deference to learned counsel for the defendants, it will be useful to visit the genesis of the plaintiff's action as the importance of doing so was repeatedly emphasised. And so it is noted that in the very beginning the plaintiff's action was commenced by originating summons (the OS). By the OS the plaintiff had principally applied for reliefs pursuant to s. 162 of the Companies Act 1965 (the Act) consisting of rectification of the register of the third defendant in relation to the plaintiff's application for reinstatement as a shareholder and director thereof.

The OS then journeyed towards the hearing before Justice Datuk Ian Chin on 22 August 2002 when his Lordship rightly converted the OS to a writ action pursuant to O. 28 r. 4(2) of the Rules of the High Court 1980 (RHC). In consequence of the order the plaintiff took out a writ together with a statement of claim dated 12 September 2002 in suit No. S-22-101 of 2002 and served it on the defendants who in turn responded without any protest by filing and serving on the plaintiff their defence. I say this because it is very important to note that in the statement of claim the plaintiff seeks alternative reliefs in the form of orders for the payment of money from the 1st and 2nd defendant to the plaintiff and for the retention and deduction by the plaintiff of money due to the defendants.

Having recounted the journey from the genesis to the appeal now before me I must now revert to the matters complained-of by the defendants which led the learned deputy registrar to dismiss the plaintiff's application to delete the whole of prayer 1(a) to (g) of the statement of claim.

1. **The Plaintiff's Application Is Not Made *Bona Fide***

This is one of the three requisite ingredients laid down in *Yamaha Motor Co Ltd. v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 to test whether an amendment will cause injustice to the other party in which event it will not be allowed. Mr. Colin Lau emphatically argued that the plaintiff should not be allowed to totally abandon the reliefs sought by the plaintiff in the OS hence his insistence on visiting the genesis of the plaintiff's action adverted to above. It was also argued that the lack of *bona fide* on the part of the plaintiff could be seen from what the plaintiff deposed to in his affidavit in support of the application for amendment affirmed on 6 March 2003 where at para. 1, it was pointed out, the plaintiff disputed the transfer of his 100,000 shares in and removal as a director of the 3rd defendant, which were inconsistent with the plaintiff's claim for payment of RM1,256,484. The failure of the plaintiff to produce or identify documents rendering the amendment necessary was also a factor which constituted the defendants' allegation that there was a lack of *bona fide* on the part of the plaintiff. In response, learned counsel for the plaintiff, Mr. Roland Cheng with equal vigour, argued that the OS and the writ were two separate and distinct processes. The defendants could not, therefore, confine the plaintiff to matters stated in the OS.

In order to resolve the conflicting arguments advanced by both parties it would be appropriate to set out and scrutinize the relevant provisions.

Order 28 r. 8(1) and (4) of the RHC states as follows:

> Continuation of Proceedings as if cause or matter begun by writ.
>
> (1) Where, in the case of, a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.
>
> (2) ...
>
> (3) ...
>
> (4) Any reference in these rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.

His Lordship, Datuk Ian Chin's order on 22 August 2002 was as follows:

> The action is converted to one of writ. The Plaintiff is to deliver a statement of claim within 14 days and the Defendants are to deliver the defence within 14 days of the receipt of the statement of claim. After the close of the pleadings, a summons for directions shall be taken out.

The only sensible consequence of the foregoing provisions and Justice Datuk Ian Chin's order is that the plaintiff is not bound to confine himself to matters set out in the OS. It will be naive to expect and wrong to insist that the plaintiff must ignore what has transpired after the genesis. This warped notion that time must have stood still since then is utterly misconceived. There is, therefore, nothing sinister in the plaintiff's decision to abandon the reliefs sought in the OS after becoming aware that the 3rd defendant has meanwhile become insolvent and opt for monetary claim instead.

Section 162 of the Act is of no assistance to the defendants. It reads as follows:

> (1) If:
>
> (a) the name of any person is without sufficient cause entered in or omitted from the register; or
>
> (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member, the person aggrieved or any member or the company may apply to the

Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application,

(2) On any application under subsection (1) the Court may decide:

(a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between member or alleged members or between members or alleged members on the one hand and the company on the other hand; and

(b) generally, any question necessary or expedient to be decided for the rectification of the register.

It is obvious without having to embark on an exhaustive exercise in statutory interpretation, from the tenor of sub-ss. (1) and (2) of s. 162 of the Act and the grammatical context of the word "and" between the words "register" and "payment" in sub-s. (1) of s. 162 that "rectification of the register" and "payment by the company of any damages" are not conjoined but disjunctive. That being the case the plaintiff's monetary claim is, in my opinion, within the ambit of s. 162 of the Act. It is not alleged that the failure of the plaintiff to introduce or identify the document said to necessitate the application for amendment has prejudiced the defendants and the plaintiff's omission in that regard does not, in my opinion, constitute any lack of *bona fide* on the part of the plaintiff.

The defendants' objections to the application for amendment on the basis of lack of *bone fide* are, therefore, without merit.

2. **Changing The Character Of The Suit**

This is the third of three tests laid down in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn Bhd & Ors (supra)*. It is contended for the defendants that by seeking to delete prayers 1(a) to (g) of the statement of claim the plaintiff has thereby changed the character of the suit by departing from the original reliefs for rectification of the 3rd defendant's register to reinstate the plaintiff as a director and shareholder of the 3rd defendant to one of monetary claim. Having decided the way I did on s. 162 of the Act above this argument is also flawed. Even if I am incorrect on this it is vital to recall that the defendants have in fact conceded to the amendment to paras. 10 and 12 of the statement of claim which relate to the inclusion of facts relevant to establish liability for the monetary claim the plaintiff intends to pursue instead of the reliefs pursuant to s. 162 of the Act which the plaintiff seeks to abandon by the amendment to the statement of claim.

In *Syarikat Ting Mui Sdn Bhd v. Muthusamy a/l Sellapan & Other Appeals* [1999] 4 CLJ 651 Clement Skinner, JC (as he then was) set out the following principle at p. 662:

> Whilst I agree that the relief sought remaining unchanged is a factor that should be taken into account, in my judgment, the court will concern itself more with the facts relied upon by the appellant in claiming that relief because it is principally upon those facts that the court will arrive at a finding on whether or not the character of the suit has changed.

Applying this principle to the facts set out above it is obvious that the defendants' contention on this ground is misconceived. It is pertinent to add that the monetary claim of the plaintiff is already clearly set out in the alternative prayer in the statement of claim.

The defendants have without objection responded with their defence to the plaintiff's statement of claim. Irrespective of the outcome of the application to delete prayer 1(a) to (g) the alternative prayer for monetary claim remains an integral part of the statement of claim. That being so, it seems to me that the defendants' objection is an exercise in futility.

3. Prejudice To The Defendants, Abuse Of Court Process And Non-existent Claim

For the reasons I have stated I do not think the defendants can succeed on any of the three grounds set out above. Suffice it to add that if indeed the plaintiff is pursuing a non-existent claim then the plaintiff will certainly rue the consequences at the trial. It is not for the court to determine at this stage of the proceedings the question whether the plaintiff's claim is non-existent.

At the end of the day, what must be borne in mind is that the application for amendment, if allowed must not cause injustice to the defendants. (See *Bacom Enterprise Sdn Bhd v. Jong Chuk* [1998] 2 CLJ 11. On the other side of the coin is that justice dictates that litigants like the plaintiff in this case, must be given the choice to seek whatever form of redress open to the litigant within the scope of the relevant provisions of the law and Rules of Court, and to amend it if there is a need to do so, unshackled by what the litigant had originally contemplated and set out when the action was first commenced.

For the reasons stated above I found there was no injustice to the defendants if the amendment was allowed and accordingly ordered that the decision of the learned deputy registrar dismissing the plaintiff's SIC to amend the statement of claim by deleting the whole of prayer 1(a) to (g) be set aside and substituted with an order that the plaintiff be allowed to do so. Accordingly, I allowed the appeal with costs.